Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

PETITION FOR CLARIFICATION AND RECONSIDERATION BY THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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September 30, 1996

SUMMARY

The Commission is to be commended on completing the enormous task of adopting rules implementing Sections 251 and 252 of the Communications Act of 1996 in its Interconnection Order. The rules are in line with the Congressional intent to implement competition in the local exchange market in a timely and efficient manner. At the same time there are a number of areas of the rules that need clarification. Thus, ALTS seeks reconsideration of several aspects of the Interconnection Order.

Specifically, ALTS seeks clarification that:

- The Commission should clarify an interconnector's right to the deaveraging of proxy loop prices, and the method by which such deaveraging should be accomplished.
- ILECs should not be allowed to use nonrecurring charges for unbundled network elements to defeat competition.
- The Commission's regulations concerning production of cost data should be conformed to the text of the Interconnection Order.
- Clarification that MUXs and cross-connects are each unbundled network elements.
- The Commission should clarify that interconnectors can change tariffed collocation arrangements to negotiated agreements without the imposition of NRC charges.
- Interconnectors should have the right to discover existing relevant interconnection agreements during the negotiation process, and refusal to produce such documents should be evidence of bad faith on the part of the incumbent local exchange carrier.
- The Commission should amplify its requirement that non-parties may request individual items from approved agreements.

In addition, the Commission should reconsider a number of the conclusions it reached in the Interconnection Order:

- The Commission should permit subloop unbundling in the distribution and feeder plant.
- The Commission should provide a "fresh look" period so that customers of incumbent LECS can consider competitive carriers without excessive penalties.
- The Commission should impose the $1 sale and leaseback requirement.
- The Commission should order compliance filings.
- The Commission should find that existing state approved bill and keep arrangements are unaffected by the Interconnection Order.
- ILEC refusals to include ordinary commercial enforcement mechanisms in interconnection agreements should constitute a violation of the duty to negotiate in good faith.

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Pursuant to Section 1.429 of the Commission's rules, the Association for Local Telecommunications Services ("ALTS") hereby petitions for clarification and reconsideration of the Commission's First Report and Order in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 ("Interconnection Order") released August 8, 1996, in the above proceeding (FCC 96-325).[1]

I. ISSUES REQUIRING CLARIFICATION

ALTS will first address the issues raised in the Interconnection Order that require clarification, and then turn to the issues that require reconsideration.

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[1] ALTS is the national trade association for over thirty facilities-based competitive providers of access and local exchange services. ALTS submitted both initial and reply comments in this proceeding.

A. The Commission Should Clarify An Interconnector's Right to the Deaveraging of Proxy Loop Prices, and the Method by Which such Deaveraging Should be Accomplished.

In its Interconnection Order the Commission concluded that the "rates for ... unbundled elements must be geographically deaveraged" (¶ 764), and found that at least three discrete categories are needed to adequately capture loop cost differences when setting rates for unbundled elements. At the same time, the Interconnection Order does not set forth a specific methodology for deaveraging the loop prices contained in Appendix D. The Commission needs to clarify three aspects of this part of its Order.

First, the Commission needs to clarify that the proxy loop prices contained in Appendix D are fully subject to its deaveraging requirement, provided that implementation and review of the underlying deaveraging methodology would not burden either the state resources and statutory deadlines which the Appendix D prices are intended to protect.

Second, the Commission should clarify that either the loop density paradigm of the Benchmark Cost Model, or of the Hatfield 2.2 model (both of which were employed as part of the overall methodology which generated the Appendix D prices (Interconnection Order at ¶ 794)), or their equivalent, can be used to generate deaveraged Appendix D prices. MCI has recently filed an ex parte submission showing how the Hatfield model can be used to generate loop prices for five different categories of wire center loop densities.

Third, the Commission should clarify that deaveraging by wire center loop density, as exemplified in the recent MCI ex parte filing, is an acceptable form of deaveraging. Segmenting wire centers into homogeneous groups according to their loop density better tracks loop costs than trying to generate broad geographic deaveraging, which could easily produce misleading numbers by combining high-density and low-density wire centers through the accident of their geographic proximity. This, in turn, could unduly thwart the spread of competition in 2nd and 3rd tier markets.

B. ILECs Should Not Be Allowed to Use Nonrecurring Charges for Unbundled Network Elements to Defeat Competition.

One of the most serious gaps in the Interconnection Order is the absence of concrete principles to guide the calculation of the nonrecurring charges of unbundled network elements. The discussion at ¶¶ 743-52 of the Interconnection Order is impeccable in its analysis of the distinction between recurring and nonrecurring charges, and in its review of the ways in which state commissions could handle various rate timing issues in an equitable manner.

What is missing, unfortunately, are specific protections against ILEC efforts to use outrageous nonrecurring charge demands as a tactic to sabotage any meaningful provisioning of unbundled network elements. The reason nonrecurring charges create such an opportunity is that the factual aspect of most recurring unbundled network element costs (loop maintenance,

garage overhead, etc.) tends not to differ between unbundled network elements and analogous ILEC services, so the basic cost differences involve conceptual issues that were largely resolved by the Interconnection Order.

On the other hand, nonrecurring costs such as service ordering, provisioning, etc., are relatively novel events for unbundled network elements, at least so far. This factual novelty emboldens the ILECs to make cosmic claims about the nonrecurring costs of provisioning unbundled loops and similar facilities. If the NRCs are set at an unreasonable level, they could constitute a significant barrier to entry. The Commission should cure this problem by issuing a few concrete rules.

First, nonrecurring charges should be equal to or less than the lowest nonrecurring charge for the most analogous ILEC service. ILECs should not be entitled to base unbundled network element nonrecurring costs on the relatively low initial volumes for these facilities, but rather at a projected normal level that captures the same automation and volume efficiencies reflected in the ILEC's' nonrecurring charges for their end users. Since analogous services almost always involve more than just one network element, there is certainly no unfairness in using existing end user NRCs as ceilings. In fact, in most instances there should be costs that are avoided in the provisioning of unbundled elements to competitive carriers that are not avoided at the retail level. Indeed, given the innate incentive of the ILECs not to improve service to the CLECs, failure to adopt such

a rule would insure that CLECs would never see any price or service improvement in their nonrecurring charges.

Second, ILEC nonrecurring charges for unbundled network elements should be capped by the lowest of any ILEC nonrecurring charges for analogous service unless an ILEC can demonstrated why that rate is inapplicable to itself. In addition to the above rule that an ILEC's own end user nonrecurring charges should cap the nonrecurring charges that could be assessed an interconnector, the Commission should also require that any ILEC NRCs for analogous services, whether for end users or interconnectors, also serve as a cap unless an ILEC can demonstrate factual reasons why such NRCs fail to reflect its own operations.

The need for the second rule is plain. Even if interconnectors were protected by the first rule from paying higher NRCs than end users, the fact remains that few ILEC NRC rates have received vigorous regulatory scrutiny. Therefore, the best proxy of forward-looking competitive costs for nonrecurring charges should be the lowest amount charged by any ILEC in comparable circumstances, unless an ILEC can point to a clear factual distinction.

While these two rules will hardly cure all the nonrecurring charge problems, ALTS respectfully suggests that they would narrow the opportunity for ILEC abuse in this area.

C. The Commission's Regulations Concerning Production of Cost Data Should Be Conformed to the Text of the Interconnection Order.

In the text of its Interconnection Order the Commission, in addressing the duty to negotiate in good faith, discussed the duty of the ILECs and the requesting carrier to provide information necessary for the completion of successful negotiations. With respect to cost information, the Commission recognized that there is a difference between the needs of the ILEC and the requesting, competitive carrier. The Commission concluded:

> "an incumbent local exchange carrier may not deny a requesting carrier's reasonable request for cost data during the negotiation process, because we conclude that such information is necessary for the requesting carrier to determine whether the rates offered by the incumbent local exchange carrier are reasonable. . . . On the other hand, the refusal of a new entrant to provide data about its own costs does not appear on its face to be unreasonable, because the negotiations are not about unbundling or leasing the new entrants' networks". (Interconnection Order at ¶ 155)

In the adopted rules, however, the Commission misstated its conclusion in the text. Presumably, this was a simple technical error. The rules state that it is a violation of the duty to negotiate in good faith for a "requesting carrier" to refuse to "furnish cost data that would be relevant to the setting of rates if the parties were in arbitration." See Section 51.30(c)(8)(ii). This rule makes little sense, as it is the requesting carrier that is seeking interconnection or unbundled elements, and it is the incumbent carrier from whom costing data is relevant in determining whether the rates offered are

reasonable.

ALTS suggests that this problem can be easily fixed by changing the wording of Section 51.301(c)(8)(ii) to read:

> "refusal by an incumbent LEC to furnish cost data that would be relevant to setting rates if the parties were in arbitration."

D. Clarification that MUXs and Cross-Connects Are Each Unbundled Network Elements.

The regulations issued by the Interconnection Order reflect considerable thoughtfulness in specifying the particular facilities and services which ILECs must make available as network elements (new § 51.319). However, there are at least two specific network elements that should also be included in this part of the regulations.

1. Multiplexing Equipment

The Commission should recognize that the traffic concentration function performed by multiplexing equipment has now been a familiar part of telephone networks for over two decades, even if this particular function does not fall neatly within the "loop-switch-transport" network taxonomy.[2]

There is no technical burden imposed on an ILEC by requiring that such a functionality be provided to interconnectors at any

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[2] See, e.g., Interconnection Order at ¶ 383, 384: "IDLC technology allows a carrier to aggregate and multiplex loop traffic at a remote concentration point and to deliver that multiplexed traffic directly into the switch without first demultiplexing the individual loops ... We find that it is technically feasible to unbundle IDLC-delivered loops." See also id. at ¶ 581.

technically feasible point. The ILEC would be fully compensated for its costs, and the use of ILEC multiplexors for CLEC traffic would in no way create any network reliability issues.

2. Cross-Connects

The Commission is quite emphatic in its Interconnection Order that interconnection must be permitted at "central office cross-connect points in general" (id. at ¶ 210). Given the Commission's finding that interconnection is "technically feasible" at central office cross-connects points in general, it necessarily follows there are no technical issues in the provisioning of central office cross-connects as unbundled network elements.

Unfortunately, the unbundled network element rules in new § 51.319 do not include central office cross-connects. The Commission should rectify this omission by placing cross-connects expressly within the regulations governing unbundled network elements.

E. The Commission Should Clarify that Interconnectors Can Change Tariffed Collocation Arrangements to Negotiated Agreements without the Imposition of NRC Charges.

Some of the current interconnection arrangements that competitive carriers obtain pursuant to tariffs filed under the Expanded Interconnection Order will be superseded by interconnection agreements negotiated pursuant to Section 251 and 252 of the 1996 Act. The Commission should make it clear that when there is no technical or physical change in interconnection

received, the incumbent local exchange carrier may not impose any charge upon the competitive carrier. In other words, any change that is merely a paper change or a change in the legal instrument under which the interconnection is obtained may not be subject to a "transfer charge," or other type of charge.

F. Interconnectors Should Have the Right to Discover Existing Relevant Interconnection Agreements During the Negotiation Process, and Refusal to Produce Such Documents Should be Evidence of Bad Faith on the Part of the Incumbent LEC.

In its Interconnection NPRM the Commission sought comment on the meaning of Section 252(a), which requires interconnection agreements to be filed with the state commissions. The Commission specifically raised the question of whether agreements negotiated before the date of enactment of the Telecommunications Act of 1996 must be submitted to the State commissions. Based upon the clear statutory wording that requires all interconnection agreements "including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996" be filed with the State commissions, the Commission agreed with ALTS and most of the competitive industry that previously negotiated interconnection agreements between incumbent LECs must be filed with the States.

The Commission should clarify, however, that when relevent to specific negotiations, a requesting competitive carrier must be given access to existing inerconnection agreements even before such agreements may be required to be submitted to State commissions for approval.

In addition, refusal to provide such agreements should be evidence of a lack of good faith on the part of the incumbent LEC. The Commission clearly held that cost information is relevant and necessary for the requesting carrier to be able to determine whether the price offered by the incumbent local exchange carrier is reasonable. The prices contained in existing agreements previously entered into by the incumbent LEC and a neighboring local exchange carrier is relevant and necessary for a determination of whether the price offered is reasonable and non-discriminatory.

In order to ensure that the incumbent LECs produce the relevant agreements, it is thus important that the Commission make it clear that the refusal to produce such agreements is a violation of the duty to negotiate in good faith.

F. The Commission Should Amplify its Requirement that Non-Parties May Request Individual Items from Approved Agreements.

The Commission concluded in its Interconnection Order that (at ¶ 1321):

> " ... a carrier seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis."
>
> " ... we leave to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis."

ALTS respectfully requests that the Commission amplify what

should be obvious from the above determinations. Given that the Commission has decided that requesting non-party carriers do not have to conform to the time limits of Section 252, and given that the involved agreement has already been approved by the state, it should follow that expedited approval must take less time than the 30 days allowed for state approval of arbitrated agreements (Section 252(e)(4)).

Similarly, the Commission should amplify the nature of a request that triggers the expedited procedure. Such a request need only have three requirements: (1) a statement that the requestor qualifies as a "telecommunications carrier" as defined by the 1996 Act; (2) identification of the term or terms being requested, along with any associated conditions; and (3) a statement that the requesting telecommunications carrier will comply with the identified terms and requirements.

II. ISSUES REQUIRING RECONSIDERATION

A. The Commission Should Permit Subloop Unbundling.

ALTS asks the Commission to reconsider its decision not to consider loop unbundling at this time. Obviously, the Commission does not perceive the technical feasibility issues to be unsolvable, or it would not have permitted the states to grant subloop unbundling. Similarly, the Commission is fully aware that interconnectors are motivated to cure any network problems associated with subloop unbundling since these problems would injure new entrants as much, if not more, than entrenched providers.

Leaving subloop unbundling as a "jump ball" between interconnectors and ILECs under state supervision is simply a return to the status quo as it existed prior to the 1996 Act. ALTS respectfully suggests that the Commission's understandable caution about complex technical issues could be better accommodated by ordering that subloop unbundling be granted, subject to an ILEC showing, using verified vendor information, that such unbundling poses technical issues. This compromise would place the proper unbundling obligation back on the ILECs, while fully protecting the Commission's concern that network reliability not be compromised.

B. The Commission Should Provide a "Fresh Look" Period so that Customers of Incumbent LECS Can Consider Competitive Carriers without Excessive Penalties.

The interconnection requirements contained in Sections 251 and 252 will be meaningless, even if implemented in accordance with the Commission's rules, if customers are penalized when they consider using competitive carriers. This can happen if the incumbent LECs have signed long term contracts with customers that contain significant penalties for early termination. There is evidence that in anticipation of the coming competition, the incumbent LECs have been aggressively pursuing long term contracts with their customers.[3]

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[3] See Telecommunications Reports, September 23, 1996, at 11, quoting the Vice President of marketing of SBC Communications Corp., as seeking long-term contracts with large customers as a means of preparing for competition; Indiana Utility Regulatory Commission, Cause No. 40612, wherein the Indiana Commission has (continued...)

This situation is similar to what occurred in the Expanded Interconnection proceedings.[4] In that proceeding the Commission concluded that because long term special access arrangements could prevent customers from obtaining the benefits of the competitive environment, a "fresh look" policy needed to be adopted. Specifically, the Commission decided to limit the charges an incumbent local exchange carrier could impose on customers terminating a long-term arrangement to an amount that would place the customer and the incumbent local exchange carrier in the same position they would have been in had the customer originally chosen a shorter term arrangement. The "fresh look" option was limited to customers with contracts of at least three years, and entered into prior to the adoption of the initial Expanded Interconnection Order.

At least one commenter suggested that the Commission should adopt a similar policy in this proceeding.[5] While the Commission cited these comments, apparently the Commission viewed the request as only seeking a "fresh look" period for the incumbent local exchange carrier-to-incumbent local exchange carrier

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[3](...continued)
commenced a proceeding to investigate whether Ameritech's raising of the rates for short-term Centrex service (while leaving untouched the rates for long-term service) is a barrier to competition at the local level; See also Comments of Intermedia Communications, Inc. in CC Dkt 96-98, at 15 (filed May 16, 1996).

[4] See Expanded Interconnection with Local Telephone Company Facilities, CC Dkt No. 91-141, Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7341 (1993).

[5] See, e.g., Comments of ICI at 15-16.

contracts that are to be filed with the State Commissions pursuant to Section 252(a). The Commission did not consider the request for a "fresh look" period for retail customers of the ILECs.

The need for a "fresh look" period for retail customers with long term contracts is at least as compelling at this time as it was in the Expanded Interconnection context. Like the customers for whom the Commission provided a fresh look in the expanded interconnection case, the customers who have signed long term contracts for many local services will be presented for the first time with options that they may never have even contemplated. If these customers are denied a meaningful opportunity to consider and use the competitive services, the competitive local exchange market envisioned in the 1996 Act may never develop.

C. The Commission Should Impose the $1 Sale and Leaseback Requirement.

One of the most glaring errors in the Interconnection Order is the Commission's failure to impose the "$1 sale and repurchase" arrangement for Expanded Interconnection. The Commission concluded that (id. at ¶ 607):

> "We also decline to adopt the suggestion that we require LECs to offer virtual collocation under the `$1 sale and repurchase option.' We do not find evidence that such a specific requirement is necessary at this time."

This conclusion is inconsistent with the facts and the Commission's prior holding. In its Order on Remand, 9 FCC Rcd 5189, at ¶ 127, the Commission declined to adopt such a provision

solely out of its concern that it might constitute a then-improper physical collocation requirement: "A $1 sale and repurchase right would effectively make the interconnector the owner of the equipment in all but formal title, and would perhaps run afoul of the D.C. Circuit's analysis in Bell Atlantic v. FCC." There should no longer be any concern over the issue of whether such a provision would be a physical collocation as the 1996 Act gives competitive providers physical collocation rights.

As for the facts, the Commission is -- or should be -- well aware that the one RBOC which has chosen not to accept the $1 arrangement -- SWB -- is the object of intense controversy concerning its pricing of central office equipment for collocation. Inasmuch as completion of the various investigations concerning SWB's behavior no signs of moving quickly to completion, ALTS respectfully suggests that mandating the use of the $1 arrangement is both an equitable, and highly pragmatic way of curing this controversy, or at least minimizing any additional controversy.

D. The Commission Should Order Compliance Filings.

Nowhere in its Interconnection Order does the Commission require the ILECs to file any reports, or to perform any monitoring concerning their compliance with the 1996 Act and the Commission's implementing regulations. To the extent that the Commission is concerned about minimizing the regulatory burden of any company which appears before it, that concern is entirely understandable. Furthermore, many specific disputes will come

before the Commission through preemption petitions, Section 208 complaints, and primary jurisdiction referrals from district court appeals concerning state interconnection decisions.

However, it might save the Commission considerable trouble to have some way of viewing the forest other than having to count each tree. Because ILECs must response to each statutory interconnection request, they already are tracking the progress of those negotiations: who made them, arbitration status, state decision dates, etc. There would be no burden on the ILECs to require that these statistics be forwarded to the Commission, perhaps via USTA, which could consolidate them into a single format.

ALTS applauds the Commission's deregulatory stance, but a "hands off" approach need not require it to keep its eyes closed. An important insight about this approach can be found in the Commission's Expanded Interconnection orders, where the ILECs were ordered to file biennial reports on interconnection arrangements (see, e.g., Order on Remand, 9 FCC Rcd 5154, 5177). To the best of ALTS' knowledge, none of those required reports has ever filed. An ounce of oversight in the present case will save considerable Commission intervention in the future.

E. The Commission Should Find That Existing State Approved Bill and Keep Arrangements Are Unaffected by the Interconnection Order.

ALTS respectfully requests that the Commission reconsider its determination that:

> "If state commissions impose bill-and-keep arrangements, those arrangements must either include provisions that impose compensation obligations if traffic becomes significantly out of balance or permit any party to request that the state commission impose such compensation obligations based on a showing that the traffic flows are inconsistent with the threshold adopted by the state." (Interconnection Order at ¶ 1113)

There is no need to impose this obligation on those bill-and-keep arrangements which were negotiated prior to the 1996, particularly where other LECs are permitted to continue with bill-and-keep arrangements without even having to file them with state commissions before June 30, 1997.

F. ILEC Refusals to Include Ordinary Commercial Enforcement Mechanisms in Interconnection Agreements Should Constitute a Violation of the Duty to Negotiate in Good Faith.

In its initial comments ALTS advocated that the Commission include in its rules a provision that it is a violation of the statutory duty to negotiate in good faith for the incumbent local exchange carrier to refuse to be subject to reasonable commercial enforcement mechanisms.[6] The Commission in its Interconnection Order did not specifically address this issue. Rather, the rules list a number of actions that will be considered to be a violation of the duty to bargain in good faith and indicated that in all other cases it would look at the totality of the circumstances in reviewing a complaint that a carrier had failed to bargain in good faith.

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[6] See Initial Comments of ALTS, Attachment A, page 14, proposed rule **.401(c)(3).

As the Commission is well aware, the signing of an interconnection agreement is meaningless unless the agreement is implemented in a meaningful and timely manner. It does not matter if a competitive carrier has an agreement specifying the time in which an unbundled element will be provisioned if, in fact, the time period is consistently violated. Significant harm to the competitive carrier is almost assured if the timeliness and quality of service terms and conditions are not met. As the Commission is well aware, a competitive carrier's customer will quickly assume that any problem in receiving service is the fault of the competitive carrier, not the interconnecting incumbent local exchange carrier.

As the Commission is also well aware, if a significant number of complaints are filed at the Commission in the coming months the Commission's resources could be quickly overloaded, if they aren't already. To the extent that the Commission can clarify and specify what it will consider to be a violation of the duty to bargain in good faith, it will ensure that a greater percentage of the problems in implementing the Act are solved between the relevant parties. To the extent that problems of implementation of interconnection agreements can be solved without Commission or Court intervention, public resources will be saved and the local competition that the 1996 Act envisioned will develop sooner rather than later.

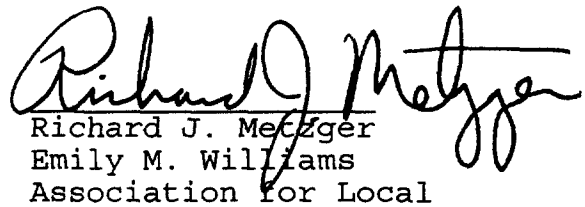
The Commission should make it clear that refusal of an incumbent local exchange carrier to include any ordinary commercial enforcement mechanisms in its interconnection

agreements is a violation of the duty to bargain in good faith. The Commission need not specify what kind of enforcement provision should be allowed in an interconnection agreement. Rather it should simply provide that the refusal to include an enforcement mechanism is a violation of the duty. Such provisions are almost universally included in commercial contracts. Their inclusion in interconnection agreements should not cause any injury to the incumbent LECs. If the incumbent does not believe that it can satisfy the requirement of the interconnection agreement, it should not be signing the agreement in the first place.

CONCLUSION

For the foregoing reasons, ALTS requests that its petition for clarification and reconsideration be granted.

Respectfully submitted,



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September 30, 1996

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Clarification and Reconsideration by the Association for Local Telecommunications Services was served September 30, 1996, on the following persons by First-Class Mail or by hand service, as indicated.

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